No. 14985

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIAN SCOTT,

Appellant,

vs.

RKO RADIO PICTURES, INC., a Corporation,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Introductory Statement.

This case and the case of *Ring Lardner v. Twentieth Century-Fox Film Corporation,* herein sometimes referred to as the "*Lardner* Case" were tried together in the first instance and in each case the jury brought in a general verdict in favor of the plaintiff. In the *Lardner* Case there were special verdicts to the effect that Lardner had not breached his employment contract and that Twentieth Century-Fox had waived the breach if there was one. In the *Scott* Case there were special verdicts to the effect that Scott had not breached his contract of employment and that RKO had not waived the breach if there was one. A motion for a new trial was denied in the *Lardner* Case and granted in the *Scott* Case on the ground that the general verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice.

After the decision of this court reversing the judgment in the *Lardner* Case (216 F. 2d 844), the instant case, by stipulation of the parties, was tried before the District Court without a jury, upon the record in the first trial and some additional evidence then introduced.[1] Upon findings and conclusions duly made judgment was entered in favor of defendant, and from that judgment this appeal was taken.

The circumstances out of which this action arose are in brief as follows:

Defendant was and is a producer or manufacturer of motion pictures. It has in its organization individual company producers who take charge of the production of particular pictures, and it was as such that it employed plaintiff under a written contract. Among other things, this contract provided that Scott

> "will conduct himself with due regard to public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn, or ridicule, or that will tend to shock, insult, or offend the community or public morals or decency, or prejudice the Corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement or which will injure him physically or mentally."

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[1]Except in a few instances where the evidence relates peculiarly to Scott, the evidence is identical with that in the *Lardner* Case. With the exception of Volume I (pp. 1 to 149) the Transcript of Record on Appeal in the instant case is identical with the Transcript of Record in the *Lardner* Case, references to which latter will be designated "L. R.".

Between October 20th and October 30, 1947, the Committee on Un-American Activities of the House of Representatives conducted a public hearing as part of its investigation of alleged Communist infiltration of the motion picture industry. Plaintiff and nine other men with whom he had agreed as to his and their course of conduct before the Committee, were called as witnesses and, upon being questioned, each of them refused to disclose whether he was or had been a member of the Communist Party. For such refusal, plaintiff was cited and indicted for contempt of the Congress of the United States and in due course convicted.

The Committee hearing, and the conduct of plaintiff and his associates thereat, received intensive nationwide publicity by radio, news reels, news reports, editorial comment, and all other media of news distribution. It was and is the defendant's contention that the conduct of plaintiff and his associates at and in connection with the hearing created a widespread belief that plaintiff and his colleagues were Communists and that they held in contempt the Congress of the United States and the fundamental institutions of this country. It was and is the defendant's contention that the conduct of plaintiff and his associates created a widespread belief that the motion picture industry generally, and the defendant in particular, employed and harbored Communists and had a sympathetic and indulgent attitude towards Communism.

It was and is defendant's contention that plaintiff's conduct constituted a violation of public conventions and morals, that it tended to degrade him in society and to bring him into public disrepute, contempt, scorn, and ridicule, that it tended to shock, insult and offend the community and public morals and decency and to prejudice

defendant and the motion picture industry in general, and that it tended to lessen his capacity fully to comply with his employment contract. It was and is defendant's contention that plaintiff's conduct violated the express obligations of his conract and, as well, the legally implied covenant that plaintiff would conduct himself with such decency and propriety as not to injure his employer in his business.

The verdict of the jury at the first trial was to the effect that plaintiff had not violated his contract obligations. It is defendant's contention that the trial court properly granted a new trial because such verdict was contrary to the great weight of the evidence and because to have permitted such verdict to stand would have been a miscarriage of justice. It is the contention of defendant that upon the second trial without a jury, the District Court properly determined that plaintiff had violated his contract obligations and correctly rendered judgment for defendant.[2]

STATEMENT OF THE CASE.

A. The Pleadings and Issues.

Plaintiff's analysis of the pleadings and issues should be supplemented in the interest of completeness by the following:

Defendant's First Affirmative Answer alleges that at and prior to November 26, 1947, plaintiff was in default, and ever since has continued in default, under his contract

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[2]As noted in the decision by this court in the *Lardner* Case, the *Lardner* Case and *Loew's v. Lester Cole,* 185 F. 2d 641 (sometimes referred to as the "*Cole* Case"), are similar in origin and substance. This is equally true as regards the *Cole* Case and the case at bar.

because of his failure to obey reasonable instructions and directions given him by defendant.

Defendant's Supplemental Answer specifically alleged (R. 35) that plaintiff's conduct was contrary to and without due regard for public conventions and morals.

Defendant's Supplemental Answer specifically alleged (R. 35):

That among the issues presented and determined in the criminal proceeding in which plaintiff was convicted were the following:

1. The questions asked of plaintiff by the Committee on Un-American Activities were pertinent.

2. Plaintiff wilfully and knowingly refused to answer said questions.

3. Plaintiff had committed the crime of violating Section 192 of Title 2 of the U. S. Code.

That plaintiff was estopped and precluded from denying or contesting herein any of the facts so adjudicated and determined to be true.

Defendant's Supplemental Answer alleged in effect that plaintiff was in default because at all times prior to October 30, 1947, plaintiff concealed from defendant and the public that he was a Communist, that on October 30, 1947, and prior thereto he was a Communist, that on October 30, 1947, plaintiff, as a result of his conduct during his appearance before the Committee, revealed his membership, and as a consequence, the defendant and the motion picture industry were prejudiced and subjected to public scorn and contempt.

B. The Facts.[3]

1. The Congressional Investigation and Plaintiff's Conduct in Connection Therewith.

In 1947 and for some time prior thereto considerable public attention had been directed to claims that a number of Communists had infiltrated into responsible, creative positions in the motion picture industry and were thus enabled to use and were in fact using their influence to disseminate pro-Communist and Un-American propaganda through the medium of the screen. Accordingly the Committee on Un-American Activities of the House of Representatives,[4] pursuant to its statutory authorization

> "to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principles of the form of government as guaranteed by our Constitution . . ."

(Legislative Reorganization Act of 1946, Act of Aug. 2, 1946, Chap. 753, Title I, Par. 2, Sec. 121(q), 60 Stat. 828), undertook an investigation into alleged Communist infiltration of the motion picture industry (L. R. 137-139).

Plaintiff and a large number of other persons were subpoenaed to attend a Committee hearing in Washington,

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[3]Plaintiff's presentation of the evidence is so incomplete and so highly selective that defendant feels compelled to make its own presentation. Some specific criticisms of plaintiff's presentation will be made later.

[4]Hereinafter for convenience referred to as the "Congressional Committee" or the "Committee".

D. C., which commenced October 20th and ran through October 30, 1947 (L. R. 712, 713, 876, 704). Among the persons so subpoenaed nineteen thereof became known as the "unfriendly witnesses" (L. R. 239), among whom were the plaintiff, Adrian Scott, John Howard Lawson, Lester Cole, Dalton Trumbo, Albert Maltz, Alva Bessie, Herbert Biberman, Samuel Ornitz and Edward Dmytryk (L. R. 239, 240, 253), who became known as the "ten men" (L. R. 240).

Before the hearing in Washington was over, eleven of the unfriendly witnesses were called to the stand—eight preceding and two following plaintiff (R. 739-741). One of these unfriendly witnesses was a Mr. Brecht, who was not catalogued as one of the "ten men". He was a visitor in this country, was about to return to Germany, and, when called to the stand, answered all questions addressed to him by the Committee (L. R. 422, 423).

Before setting forth the relationship between the ten men, we will set forth the testimony of plaintiff when called to the stand[5] (L. R. 330-335).

> "Mr. Selvin: The next one of the ten who testified, and I believe the date was October 29, 1947, was Mr. Adrian Scott, and the record is as follows, after Mr. Scott was sworn:
>
> 'Mr. Stripling: Mr. Scott, will you state your full name and present address for the record, please?
>
> 'Mr. Scott: My name is Adrian Scott. My address is 603 North Beverly Drive, Beverly Hills, Calif.

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[5]At the trial of the instant case there was produced a sound motion picture of the appearance of the "ten men" before the Committee (L. R. 431, 588; Exs. H and E).

'Mr. Stripling: When and where were you born?

'Mr. Scott: In New Jersey, on February 6, 1911.

'Mr. Stripling: What is your occupation?

'Mr. Scott: I am a producer.

'Mr. Stripling: How long have you been a producer?

'Mr. Scott: I believe it is a little over 2 years.

'Mr. Stripling: Are you here before the committee in response to a subpoena served upon you on September 19?

'Mr. Scott: I am.

'Mr. Stripling: And in response to a telegram sent to you on October 11 by the chairman calling for your appearing on October 29; is that right?

'Mr. Scott: Yes, that is right.

'Mr. Stripling: Do you have a statement, Mr. Scott?

'Mr. Scott: I do have a statement which I would like to read. I believe the statement is pertinent. It deals with "Crossfire" and anti-Semitism,

'The Chairman: Just a minute. We are trying to read the statement.

'Mr. Scott: Thank you.

'The Chairman: It is hard to read the statement and listen to you at the same time.

(After a pause.)

'The Chairman: This may not be the worst statement we have received, but it is almost the worst.

'Mr. Scott: May I disagree with the chairman please?

'The Chairman: Therefore, it is clearly out of order, not pertinent at all, hasn't anything to do with the inquiry, and the Chair will rule that the statement will not be read.

'Mr. Stripling: Mr. Scott, are you a member of any guild, either the Screen Directors Guild or the Screen Writers Guild?

'Mr. Scott: I don't think that is a proper question, Mr. Stripling.

'Mr. Stripling: Were you ever a member of the Screen Writers Guild?

'Mr. Scott: Mr. Stripling, I repeat, I don't think that is a proper question.

'Mr. Stripling: Are you now or have you ever been a member of the Communist Party?

'Mr. Scott: May I answer the first question, Mr. Stripling?

'Mr. Stripling: You said it wasn't a proper question.

'Mr. Scott: I will see if I can answer it properly.

'The Chairman: You said it wasn't a proper question.

'Mr. Scott: I believe it is a question which invades my rights as a citizen. I do not believe it is proper for this committee to inquire into my personal relationships, my private relationships, my public relationships.

'The Chairman: Then you refuse to answer the question?

'Mr. Scott: The committee has no right to inquire into what I think, with whom I associate.

'Mr. Stripling: We are not inquiring into what you think, Mr. Scott.

'Mr. Scott, we would like to know—' Mr. Stripling is continuing to speak. I will reread that. 'Mr. Scott, we would like to know whether you were ever a member of the Screen Writers Guild.

'Mr. Scott: I believe I have answered that question.

'Mr. Stripling: Mr. Chairman, I ask that you direct the witness to answer the question.

'The Chairman: The witness will have to answer the question.

'Mr. Scott: I beg your pardon?

'The Chairman: The witness must respond to the question by answering.

'Mr. Scott: I believe I have responded to the question, Mr. Chairman.

'The Chairman: Do you decline to answer the question?

'Mr. Scott: I have answered it the way I would like to answer it.

'The Chairman: Were you ever a member? I don't know from your answer whether you were or were not a member.

'Mr. Scott: My answer still stands.

'The Chairman: Are you a member?

'Mr. Scott: I believe I have answered the question. Would you like me to answer it in the way I did before?

'The Chairman: From your answer, I must be terribly dumb, but from your answer I can't tell whether you are a member or not.

'Mr. Scott: Mr. Thomas, I don't agree with you. I don't think you are. I have answered the question the best way I can.

'The Chairman: Mr. Vail, can you tell whether he is a member or not?'

I suppose it can be agreed that Mr. Vail was another member of the committee?

Mr. Katz: So stipulated:

Mr. Selvin (continuing):

'Mr. Vail: No, I cannot.

'The Chairman: Mr. McDowell, can you tell?

'Mr. McDowell: No.

'The Chairman: I just can't tell whether you are a member.

'Mr. Scott: I am very sorry.

'Mr. Stripling: Mr. Scott, could you tell the committee whether or not you are now or have ever been a member of the Communist Party?

'Mr. Scott: Mr. Stripling, that question is designed to inquire into my personal and private life. I don't think it is pertinent to this—I don't think it is a proper question either.

'Mr. Stripling: Do you decline to answer the question, Mr. Dmytryk?

'Mr. Scott: Mr. Scott.

'Mr. Stripling: Mr. Scott.

'Mr. Scott'—Mr. Scott speaking this time—'I believe that question also invades my rights as a citizen. I believe it also invades the first amendment. I believe that I could not engage in any conspiracy with you to invade the first amendment.

'The Chairman: Now, we can't tell even from that answer whether you are a member of the Communist Party.

'Mr. Stripling: I repeat the question, Mr. Scott: Can you state whether or not you have ever been a member of the Communist Party?

'Mr. Scott: I repeat my answer, Mr. Stripling.

'The Chairman: All right, the witness is excused.' "

The statement which plaintiff sought to read as shown by the foregoing testimony was introduced in evidence (L. R. 382-386). Copies of the statement had been prepared with the intention that they should be given to the press and, after Mr. Scott had testified, copies of his statement were distributed to the press, as were the statements of each of the ten men (L. R. 260, 261, 262).

As a consequence of his refusal to answer the questions regarding Communist Party membership and membership in the Screen Writers' Guild, plaintiff was convicted of violating Section 192 of Title 2 of the U. S. Code, was sentenced to a term of imprisonment for one year, and duly served such term (R. 128-131).

The preparations for the hearing before the Congressional Committee and the conduct of plaintiff and the other unfriendly witnesses, were given extensive and intensive publicity through newspaper articles, radio broadcasts, and the actual testimony and news reels. The whole matter was the subject of widespread editorial comment (L. R. 447, 448). The evidence shows, in fact, that the hearings were the leading current topic of news and discussion.

2. Plaintiff's Collaboration With and the Conduct of Other Unfriendly Witnesses.

The conduct of plaintiff at the hearing was premeditated and by no means an isolated incident. The nineteen unfriendly witnesses shortly after being subpoenaed held meetings and discussed the situation (L. R. 240, 408, 876, 879). They jointly employed lawyers to advise them and pooled their resources (L. R. 241-244, 412, 877, 878.) They joined in the issuance of an open letter to the motion picture industry in which they denounced

the investigation and the purposes which they ascribed to the Committee (L. R. 246-254, 878, Ex. A). They conferred together prior to the hearings and with one or possibly two exceptions each of them knew how each of the others was going to conduct himself if called to the witness stand by the Committee (L. R. 413-422). They jointly moved to quash the subpoenas served upon them (L. R. 255-257, 879, Ex. B).

As heretofore stated, eleven of the unfriendly witnesses were called to the stand by the Committee. One of them answered the questions as to membership in the Communist Party, stating in effect that he had been advised that the Committee had no right to make the inquiry but that, because he was an alien and a guest of this country, he felt he should not refuse to answer (L. R. 422, 423). Each of the remaining ten unfriendly witnesses refused to answer questions relative to his membership in the Communist Party. Each of the remaining ten by manner, voice, action and words and with different degrees of violence, challenged the authority of the Committee to conduct the investigation and imputed to the Committee improper purposes in connection with such investigation. Each of the remaining ten unfriendly witnesses had prepared and requested permission to read a statement but only two were allowed to do so. These statements were prepared with the intent that they would be delivered to the press if they were not permitted to be read, and they were so delivered to the press (L. R. 260-262). In general, these statements denounced the Committee and its purposes and in particular they failed to disclose whether the writers were or had been members of the Communist Party.

Within the reasonable limits of a brief it is not possible to do more than characterize the testimony or pre-

pared statements of the seven unfriendly witnesses who preceded and the two unfriendly witnesses who followed plaintiff to the witness stand, but the testimony is set out in full in the Record (L. R. 270 to 348) and the statements appear in the Record (L. R. 351 to 392). The sound motion pictures depicting the conduct of the plaintiff and the other nine unfriendly witnesses who refused to answer questions of the Committee were reproduced before the jury and are available as Exhibits E and H. The conduct, testimony and statement of each of these nine unfriendly witnesses is, in defendant's view of the situation, as much a part of plaintiff's conduct, testimony and statement as though he had done, said and written each of the things done, said and written by each of them.

3. The Public Attitude Towards Communism and Communists.

No evidence of the attitude of the public towards Communism and Communists was introduced, but the trial judge instructed the jury at the first trial that they must take judicial notice of the fact that at the time when plaintiff testified before the Committee and at all times thereafter, a substantial segment of the American public looked with scorn and contempt upon Communism and Communists (L. R. 1101, 1102).

It is fair to state, we believe that upon the retrial the trial judge took judicial notice of this same fact.

4. The Public Reaction to the Conduct and Testimony of Plaintiff.

Peter Rathvon, President of R.K.O. Radio Pictures Corporation during the period involved herein (L. R. 563) testified to his observation that public opinion had crystallized to the effect that the ten unfriendly witnesses

who refused to answer questions regarding their Communist membership (sometimes referred to herein as "the ten men") in defying the Committee had defied the Government and the institutions upon which it was based, and had labeled themselves as Communists and that their conduct had injured the motion picture industry. His statement was based upon the reaction of the executives of the R.K.O. organization, members of the Board of Directors, various organizations, from reading the press, from reports from the so-called Johnston office, and from numerous conversations (L. R. 564-580).

Eric Johnston, President of the Motion Picture Association of America, the so-called Eastern Association, and of the Motion Picture Producers Association, the so-called Western Association, was qualified as a public opinion expert (L. R. 432-449) and testified that it was both his observation and his opinion that because of their conduct before the Committee and, more specifically, their refusal to answer the question relative to their membership in the Communist Party, the ten men (including plaintiff herein), had caused the public to conclude that they were members of the Communist Party and that the motion picture industry was shielding and sheltering members of the Communist Party, "with all of the disrepute which that would bring to a great industry which is extremely sensitive to public opinion" (L. R. 450-455).

Two groups of editorials (Deft. Exs. F. K) were put in evidence by the defendant, and two groups of editorials (Pltf. Exs. 8 and 13) were put in evidence by the plaintiff. Samples of these editorials are supplied in the Appendix. Exhibit "F" consisted of editorials seen by Eric Johnston prior to December 3, 1947, and Exhibit "K" consisted of editorials of a date subsequent to December

3, 1947. Plaintiff's Exhibit "8" consisted of editorials which Mr. Johnston took into consideration in reaching his opinion as to public reaction, but were compiled for the purpose of showing such reaction to an open letter publicized by Eric Johnston under the title "The Citizen Before Congress", which open letter was introduced as Plaintiff's Exhibit "5" (L. R. 461) and was in substance a criticism of the procedural methods of Congressional committees. The editorial exhibits are part of the records on appeal, but because of their bulk were not designated for printing. From an examination of the editorials, it will appear that they were published in newspapers in every section of the United States, that they commented on the Committee hearings generally and on the conduct of the unfriendly witnesses, and that, while opinion was divided as to the hearing itself and certain of its procedural features, the editorials were almost unanimous in their condemnation of the Communist Party and of the conduct of the witnesses who refused to say whether they were members of the Communist Party. Many of the editorial writers drew the inference from such refusal that the ten men were in fact Communists, and stated that their conduct was an insult to the public, that it was contemptuous in fact as well as law, and that it raised doubts as to their loyalty. There were, however, editorials which supported the conduct of the ten men in their refusal to answer the questions of the Committee.

Defendant introduced in evidence (Ex. L) and plaintiff also introduced a quantity of news items (Ex. 13). Exhibits "L" and "13" are a part of the record on appeal, but here too, because of their bulk they were not designated for printing. No attempt is made to summarize their contents, but it may be fairly stated that they indi-

cate the wide newspaper coverage given to the hearing before the Committee and the conduct of the ten men.

On cross-examination Eric Johnston testified that in reaching his opinion he had probably taken into consideration radio broadcasts by the "Committee for the First Amendment" on October 26th and November 2, 1947 (L. R. 528, 529). Sound records of these broadcasts were played to the jury and the phonograph records are in evidence (Ex. 15). Statements made in these broadcasts by Senator Kilgore of West Virginia, Senator Thomas of Utah, Thurman Arnold, Evelyn Keyes and Miss Myrna Loy were read separately to the jury (L. R. 529-534, Exs. 11, 12). These broadcasts were criticisms of the Committee and contained statements justifying plaintiff and his colleagues in their conduct before the Committee.

Mr. Johnston also testified on cross-examination that he had taken into consideration a report dated December 17, 1947, by Audience Research, Inc. of its findings relative to the public reaction to the Committee's investigation of Communism in Hollywood (L. R. 485, 486). This report was put in evidence (Ex. 9, L. R. 486, 492). It shows, among other things, that since the Committee hearings, "the proportion thinking there are at least some Communists in Hollywood has risen from 55 to 61% (R. 489), that 47% thought the unfriendly witnesses should be punished, and 39% thought they should not" (L. R. 488) and that "The principal adverse effect . . . so far has been to give a segment of the American public one more reason for staying away from the movies" (L. R. 491).

Over defendant's objection that it was not material (L. R. 753), evidence was introduced to the effect that subsequent to October 30, 1947, pictures upon which plaintiff received screen credit were distributed by defendant and that defendant does not have any *written* communications from motion picture exhibitors relative to the continued showing of such pictures or threatening to cancel any exhibition contract because of the ten men or because of their citation for contempt (L. R. 755).

5. The Action of Defendant With Respect to Plaintiff.

Mr. Scott testified before the Committee on October 29, 1947. The matter of his conduct and what should be done by the defendant by reason of such conduct was elaborately discussed at meetings of the Executive Committee of defendant which were held on November 12, 13, and 22 (L. R. 847-855, R. 60-73). At the meeting of November 22, 1947, the following resolution was adopted (L. R. 850):

> "Resolved, that it is recommended to R.K.O. Radio Pictures, Inc. that said Edward Dmytryk and Adrian Scott be discharged from their employment under the 'moral' clauses of their respective contracts with the said Picture Company and authorize the President and the studio head to take such steps."

On November 26, 1947, plaintiff's employment was terminated by a notice in writing delivered to him and signed on behalf of defendant by its president (R. 87, 88).

6. Relative to the Issue of Condonation or Waiver.[6]

a. Matters Occurring Before Plaintiff Testified.

Dore Schary was a vice president of defendant and at all times pertinent here was in charge of its picture production. It was Mr. Schary from whom plaintiff received his orders (L. R. 236).[7]

Both Scott and Schary were subpoenaed to appear before the Committee. Scott was subpoenaed in September, 1947. After Scott was subpoenaed and before he left for the Washington hearing (R. 97), a discussion was had with Schary (R. 74) concerning which Scott testified:

Schary said that the studio was not interested in Scott's politics but only in his ability to make pictures. This was also the attitude of Mr. Rathvon and the studio. Scott would have the support of Schary and the studio, and the industry would be behind him.[8] Schary read to Scott

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[6]Although plaintiff's brief herein does not argue either condonation or waiver, he sets out in his "Statement of the Case" the evidence which on the first trial was made the basis for such arguments. It is only the evidence on this issue and the difference in the wording of the "morals" clause which differentiate this case from the *Lardner* Case.

[7]It is stated in plaintiff's brief (p. 5) that it was stipulated that plaintiff was qualified to perform his services as a writer and producer. While it was stipulated that plaintiff duly performed all writing, directing, and producing services required of him (R. 22), defendant made clear its refusal to stipulate that Mr. Scott was "able" to meet his contractual obligations after his appearance before the Congressional Committee (L. R. 238, 239).

[8]Mr. Scott does not disclose as to what he was to have this support, but it is perhaps fair to say that it appears in his subsequent testimony that he and Schary agreed that this hearing might be an attack on "progressive film-making" (R. 77), and that Schary told him that the industry was opposed to the investigation and felt it was an attack upon "the screen's freedom" (R. 75).

a statement which he said he was going to read to the Committee (R. 75). Schary, in the course of the discussion, spoke of a pamphlet with which he might be confronted, which he had written concerning the anti-Semitic, anti-Negro, and anti-United Nations activities of John Rankin, a member of the Committee (R. 76).

The only request that Schary made of Scott was that he conduct himself in a mannerly fashion before the Committee. Schary did not tell Scott he should refuse to answer questions asked by the Committee, and his conduct before the Committee was of his own volition (R. 78).

(On cross-examination) Scott testified further:

He believed it was before the "unfriendly witnesses" began to testify that he determined how he would testify (R. 97, 98). In his conversation with Schary before he went to Washington he did not tell Schary that he was going to associate himself with a group that was going to defy the Committee and refuse to answer questions asked by the Committee. The group had not determined at that time how they would answer or whether they were going to answer at all (R. 98). Scott did not tell Schary whether he was or ever had been a member of the Communist Party (R. 99). What Schary told him about the attitude of the industry toward the hearing was that the industry was going to fight any suggestion that there was any Communist propaganda in any of its pictures (R. 99, 100).

Dore Schary testified in substance regarding this discussion as follows:

He told Scott that his job was safe, that the Studio "could not inquire" into the political activities of employees

and that the studio's only concern was their ability (L. R. 691).

He told Scott he had helped write a pamphlet which was an attack on Rankin and that he might be under attack if Rankin sat on the Committee (L. R. 691). The pamphlet was leveled against the personality and record of Rankin and was not an attack on the Committee. He believed some of the Committee's procedure was dangerous (L. R. 693). He had the intention of making a strong statement before the Committee attacking its "techniques" and he read this proposed statement to Scott. He changed his mind about making the statement. He did not inform Mr. Scott that he had changed his mind (L. R. 695).

Schary told Scott he intended to answer all questions asked by the Committee (L. R. 695).

Schary told Scott he had induced a trade paper to write "the first article" attacking the technique or procedure of the Committee and challenging the charge that there was Communist Party propaganda in motion pictures (L. R. 700, 701).

On behalf of the unfriendly witnesses as a group, their attorneys requested and held a meeting with Eric Johnston, President of the Eastern and Western Associations, and Messrs. McNutt and Benjamin, counsel for the Associations. This meeting took place the night before the hearings commenced. It was concerned with a discussion of the motion to quash which was being filed by the unfriendly witnesses and of the position which the Associations intended to take at the hearing. In these discussions plaintiff's attorneys were told that the motion picture industry had publicly welcomed the investigation,

asking only for a fair hearing, and so could not join in any attack on its validity or legality. Mr. Kenny testified that at the end of the meeting Mr. Johnston was asked if there were any truth in rumors that there would be an industry blacklist of men who resisted the Committee, and he replied there would be no blacklist so long as he was President (R. L. 625-641, 759, 766). Mr. Johnston testified that the answer to this query was only to the effect that Mr. Johnston had made no agreement with the Committee (L. R. 763-765).[9]

Nothing was said at this meeting as to what the attitude of Mr. Kenney's clients (the "unfriendly witnesses") would be in the event they were asked about their Communist Party membership. The question did not come up (R. L. 641). Mr. Kenney stated, however, that if the motion to quash was denied, his clients would answer all pertinent questions of the Committee (L. R. 637).

During this meeting Mr. McNutt, counsel for the Producers' Association (L. R. 627), said that the producers were going to make the same fight that Wendell Wilkie made for the motion picture industry before the Nye Committee (L. R. 631).

Before Mr. Scott took the witness stand, certain public statements had been made by representatives of the motion picture industry. Included in this category was an open letter to Congress signed by Eric Johnston and published as an advertisement in a number of newspapers. The gist of the letter was a suggestion that Congressional investigative procedure be overhauled so as to make more secure the rights of individual citizens, protect them

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[9]Plaintiff's brief (16) sets out the testimony of Mr. Kenny but not that of Mr. Johnston.

against defamation and smearing, and give them an adequate opportunity to be heard (L. R. 461, Ex. 5). Included also was a press and radio statement issued by Mr. McNutt (L. R. 467, 468, Ex. 3, L. R. 471, 472, Ex. 3), in which he insisted that the hearing had demonstrated that there was no Communistic propaganda in pictures and in which he said that he would advise the industry against concerted action to compile a blacklist of Communists, as such action would not be in accord with an announced policy of Congress, or rulings of the Supreme Court.

Before Scott's appearance before the Committee, Eric Johnston had testified that there was an executive session of the Committee in Hollywood in June, 1947, and after that meeting Johnston had proposed a three point program to the Producers' Association (L. R. 493), and that one point was an agreement not to employ proven Communists (L. R. 496). Johnston was convinced at the time the Association refused to agree to this, that their reasoning was sound (L. R. 499).[10] Mr. Johnston also testified at the same time, at some length and with considerable emphasis, that he would not, for a variety of stated reasons, employ any proven Communist in the motion picture industry (L. R. 517-522).

When Scott took the witness stand, seven of the "ten men" had testified. Each of them had refused to answer questions as to Communist Party membership and the Committee had recommended that each of them be cited for contempt. These facts were known to Scott before he testified (L. R. 260).

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[10]Although plaintiff's brief refers to the foregoing statements and testimony, no effort was made to prove that any of this matter was known to plaintiff at the time he testified before the Committee.

b. Matters Occurring After Plaintiff Testified.

Mr. Scott testified that after his return from Washington he worked in the studio every day until he was discharged (R. 82). Following his testimony he had several conversations with Mr. Schary:

The first of these was a telephone conversation in New York in which they both spoke "a little bit" about the hearings and Schary said they should forget about them, go back to the studio and attend to their job of making pictures (R. 80, 81).

The second conversation was in Hollywood and, in response to an inquiry by Scott, Schary said he didn't know what was going to happen (R. 81). Scott asked him about the effect of the hearings on the "jobs of everybody" and Schary said he thought there would be an "unannounced blacklist", which Schary thought was "pretty terrible" but he would continue men on the basis of their ability (R. 83). Schary also said that he resented the "sell-out" of the industry, that the industry was "to stand up and fight against the Committee" and that he alone took the agreed position. Schary thanked Scott for conducting himself in a mannerly fashion and said "he personally resented being made the Patsy of the hearing" (R. 82).

There was a second Hollywood conversation with Schary, Scott said, in regard to a "statement" in which Scott was willing to say that he was opposed to the overthrow of the government by force and in case of war was prepared to fulfill his citizenship obligations. Schary approved the statement. Schary gave the statement to Rathvon on the intercommunication system and told Scott Rathvon was not satisfied with it (R. 83, 84).

On cross-examination Scott testified further as to these conversations and in effect as follows:

It was Scott who sought the first meeting in Hollywood with Schary for the purpose of ascertaining what his status might be as a result of the Washington hearings (R. 101, 102). As a result of his conversation with Schary he "was apprehensive" as to what might happen to his job.[11]

Schary testified to this effect concerning these conversations with Scott:

Schary recalls no telephone conversation with Scott in New York (L. R. 701). He does not recall and does not believe he had any conversation in which he said to Scott that "they should forget the hearings and go back to Hollywood and make pictures, that that was their job."

Schary remembers these discussions with Scott in Hollywood (L. R. 702, 703). He told Scott that he still took the position that he had taken in Washington, *i. e.,* that a man's employment had to be based on his ability rather than on any political affiliation (L. R. 704). Scott asked specifically whether Schary thought Scott's job was in danger and was told that Schary thought a great deal of pressure was being put on the industry (L. R. 705). Schary told Scott that, despite Schary's personal stand, the pressure of public opinion and pressure groups might result in trouble. Later "we" tried to get Scott to sign an affidavit which "we" thought might protect his position with out board of directors who were insisting as he told Scott that we get a non-communist statement from him (L. R. 705). Scott was willing to

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[11]None of this testimony is set forth in plaintiff's "Statement of the Case".

sign an affidavit saying he was not in favor of any party that would overthrow the government by force but not one which would specifically state that he was not or had not been a communist. Schary told Scott that the affidavit he proposed was not acceptable to Rathvon. He told Scott this meant he was probably in trouble (L. R. 707).[12]

Mr. Schary told Scott that the issue with the Committee had not been properly joined; that they should have told the Committees very quietly that they thought the Committee had no right to ask such a question; that they should have then left the stand, should have called a press conference and should have told the press whether or not they were communists and that they had refused to answer the question in order to find out whether there was a constitutional challenge involved.[12]

In Schary's testimony before the Committee he testified that he would not employ a communist if it were established that a communist was a person dedicated to the overthrow of the government by force (709, 710).[12]

On Scott's return to Hollywood he had several conversations with Peter Rathvon, the President of the defendant and concerning these he testified:

Scott was in Mr. Rathvon's office when he received the notice of his discharge. Mr. Rathvon had first handed him a letter which stated that if he went on voluntary suspension and if he was acquitted in the courts and if he signed an affidavit that he was not and never had been a member of the Communist Party, he could then resume his contract "at the point at which these facts were de-

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[12]This evidence does not appear in plaintiff's "Statement of the Case".

termined." He asked Rathvon for an opportunity to consult his attorney and was told he could not but had to sign the letter at once. When he refused he was handed his discharge (R. 85, 86).

On cross-examination Mr. Scott testified further:

Scott had a conversation with Rathvon between his first and second conversations with Schary following his return to Hollywood. Rathvon did not express approval of Scott's conduct before the Committee—on the contrary (R. 103). Mr. Rathvon asked Scott to make a statement about his "political affiliations." Scott said he would discuss this with his attorneys (R. 104).

Rathvon said the situation was a very bad one as a result of the hearings in Washington, that feeling against the industry was "snow-balling" and something had to be done. He told Scott that no one who was a communist could work for R.K.O. (R. 108, 109). He left no question in Scott's mind but that he would be fired if he did not make a satisfactory statement about his "political affiliations" (L. R. 110, 111, 112).

Scott talked over with his attorney the matter of making such a statement as Mr. Rathvon demanded and then he had the talk with Schary in which as above set out he told Schary what he would be willing to say and learned this was unacceptable to Rathvon (R. 113, 114).

After this conversation with Schary, Scott had a further conversation with Rathvon. Scott was accompanied by Mr. Kenny as his attorney. Scott was not prepared to make a declaration that he was not and never had been a member of the Communist Party and so advised Rathvon (R. 114, 115). The previous conversation with Rathvon was at the end of the first or early in the second

week of November (R. 107). It took place at Rathvon's request (L. R. 564). This second conversation occurred on November 22 (R. 116).

There was a third conversation with Rathvon on November 26 after Mr. Kenny had left for New York (R. 116), and it was this conversation at which Scott received his notice of discharge after again refusing to make the statement required by Rathvon (116-120).[13]

Mr. Rathvon's testimony, through his deposition, concerning his conversations with Scott, insofar as they related to Scott's discharge, is, in substance, as follows:

He was, as president, the chief executive officer of the defendant (L. R. 563).

In the forepart of November, 1947, he called Mr. Scott into his office and told him he should take a stand that would enable the studio to have a "clear-cut position in relation to him." Rathvon told Scott the latter should make a declaration about his political beliefs. He told Scott the "ten men" had put on a disgraceful show before the Committee, that the public thought they had defied the government, that they had flaunted the institutions of their country and that they were communists and some step had to be taken to head off "a growing wave of activity against our industry" (L. R. 563-566).[14]

Mr. Rathvon was not asked about his further conversations with Scott.

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[13]None of this evidence appears in plaintiff's brief except that which relates to Scott's talk with Schary when he ascertained his proposed statement was unsatisfactory to Rathvon and that which relates to the final Scott-Rathvon interview.

[14]This evidence of Rathvon is meagerly set forth in plaintiff's brief.

R.K.O. Executive Committee Meetings.

The minutes of a meeting of the Executive Committee of defendant held November 12, 1947, show in substance (L. R. 853-855; Ex. I):

The problems arising out of the Washington hearings were reviewed. Schary complained that he had been subjected to newspaper criticism for testimony which was in line with the position the industry had agreed to take. It was agreed that Scott and Dmytryk (another employee of R.K.O.) had by actions and associations "brought themselves into disrepute with a large section of the public", had offended the community and prejudiced R.K.O. Mr. Silverberg gave his "off-hand" legal opinion that they had violated their contracts. It was requested that he advise definitely on this proposition.

The minutes of an Executive Committee meeting held November 13, 1947, show in substance as follows (R. L. 851-853):

It was the consensus that if, in the opinion of counsel, the company had the right so to do, the contracts of Scott and Dmytryk should be terminated. Counsel stated that he was examining the legal questions involved.

The minutes of an Executive Committee meeting held November 22, 1947, show in substance as follows (L. R. 848-851):

After discussing the conduct and associations of Scott and Dmytryk, the public reaction thereto and the resulting prejudice to the company and the motion picture industry and after being advised by legal counsel that the services of Scott and Dymtryk could be rightfully terminated,

there was adopted the resolution recommending termination which has hereinbefore been set out.[15]

Mr. Rathvon testified relative to these Executive Committee meetings in substance as follows (R. 60-73):[16]

Everyone present at the first meeting, including Schary, thought the "ten men" had performed a great disservice to the industry but on the remedy of discharge Schary was at variance with the rest of us. Schary and Rathvon were both hopeful that we could get some sort of statement from Scott and Dmytryk that might make it unnecessary to discharge them. We were all much concerned and felt that something had to be done (R. 68, (69).[17]

7. Supplementing and Correcting Certain Items in Plaintiff's Statement of the Case.

Before the Washington hearing there were meetings at the residence of Mr. Robinson and Mr. Milestone (Pltf. p. 7). Mr. Dmytryk was questioned as to whether at these or *prior* meetings there were discussions of the attitude the 19 "unfriendly witnesses" would take if asked by the Committee concerning Communist Party membership. His statement was to the effect that at these meetings "No one attitude or procedure was . . . recommended over any other" (L. R. 408-413).[18]

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[15]None of the evidence drawn from the Executive Committee minutes is set forth in plaintiff's brief.

[16]We shall limit this to matters pertaining directly to the matter of Scott's discharge and in that matter shall seek to avoid repeating that which has been dealt with in the minutes.

[17]This evidence is absent from plaintiff's brief.

[18]As it appears in the brief (7) one might be lead to believe that the statement was not limited to the Milestone and prior meetings, particular as the arrangement in the brief (7, 8) seems to make it a part of another immediately quoted statement by Dmytryk (8).

At page 8 of plaintiff's brief Dmytryk is quoted as saying that there was never a group discussion in which there was a group decision as to the attitude to be taken by the unfriendly witnesses when called before the Committee. When Dmytryk made this statement, he was being questioned about the activities of the "unfriendly witnesses" after these earlier meetings and at any time before they appeared before the Committee (L. R. 407-414). He testified as follows:

We had our discussions (as to what their attitude would be if questioned by the Committee regarding Communist membership) in small groups (L. R. 414). There was a specific reason for not discussing this in the group as a whole; one of our attorneys pointed out that the group as a whole should not discuss this subject because it would lay us open to a charge of conspiracy (L. R. 414, 415). Each of the "unfriendly witnesses", with one or possibly two exceptions, knew before he took the stand how each of the others was going to conduct himself if called to the witness stand by the Committee (L. R. 413-422).[19]

At page 9 of his brief plaintiff seeks to indicate that Eric Johnston's opinion as to the public's reaction to the conduct of the "ten men" was limited to the expression "unfavorable". Mr. Johnston's more extended opinion has been referred to under our heading "The Public Reaction to the Conduct and Testimony of Plaintiff."

At page 14 of his brief plaintiff states that Rathvon's view of the state of public opinion was based on "newspaper reading, Legion Post resolutions and on material furnished him by the Motion Picture Producers Associa-

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[19]There is no reference in plaintiff's brief to this evidence.

tion." The basis of Mr. Rathvon's opinion was much broader than this (L. R. 563-573).[20]

At pages 16 and 17 of plaintiff's brief there is set out a stipulation to the effect that the pictures in which Scott had worked continued to be exhibited and, in pursuance to the terms of his contract Scott received screen credit. The stipulated facts were admitted over the objection of defendant that the evidence went beyond the issues and was not material to the issue of waiver (L. R. 643, 752-756).[21]

C. The Findings of Fact and Conclusions of Law.

The retrial of the case (after a new trial had been granted following the verdict in the original trial) had been delayed pending a decision by this court in the *Lardner* case (R. 141).

Because the content of the Findings and Conclusions must be dealt with in some detail in the argument, the content is not set out at this point.[22]

D. Judgment.

The judgment was that plaintiff take nothing, that the case be dismissed on the merits and that defendant recover costs (R. 57, 58).

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[20]The testimony concerning the nature and basis of the opinions of Johnston and Rathvon is identical with that presented to this court in the *Lardner* case.

[21]This identical situation was before this court in the *Lardner* case and this court held that defendant's objection was sound (216 Fed. 844 at 854).

[22]The Findings (except on the issues of "inducement" and "waiver") are based upon the identical evidence (except as to the wording of the "morals" clause) which was before the court in the *Lardner* case and are consistent with what in that case this court determined to be the effect of that evidence. The Conclusions are those which in the *Lardner* case this court decided flowed properly and necessarily from that evidence.

ARGUMENT.

Preliminary.

Since plaintiff's brief contains no argument upon the issues of "inducement" or "waiver", we shall assume—justifiably, we believe—that plaintiff concedes that these issues were properly decided against him.[23]

We shall present briefly our own contention to the effect that the findings are supported by the evidence and warrant the conclusions of law.

The Findings Are Supported by the Evidence.

The issues of inducement and waiver being eliminated we have in this case (except for some unimportant differences in the wording of the "good conduct" clauses of the employment contracts) the identical evidence which was before this court in the *Lardner* case. If then it should appear that the "good conduct" clause in this case is in substance the same as the "good conduct" clause in the *Lardner* case, this court's decision in the *Lardner* case would be conclusive on the proposition that the Findings in this case are supported by the evidence wherever the Findings conform to determinations concerning the effect of the evidence in the *Lardner* case.

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[23]In his Statement of the Case plaintiff set forth favorable (to plaintiff) but incomplete evidence which had no bearing on any issue except "inducement" or "waiver".

The "Good Conduct" Clause in This Case Is the Equivalent of the Corresponding Clause in the Lardner Case and, Since the Evidence Concerning Scott's Conduct Is Identical With That Concerning Lardner's Conduct, the Discharge of Scott Was Equally Justifiable.

In the *Lardner* case this court referred to its decision in *Loew's, Incorporated v. Cole,* 9 Cir., 185 F. 2d 641 and set out in parallel columns the "morals" or "good conduct" clauses in the Cole and Lardner contracts (p. 848), stating in effect that the *Cole* and *Lardner* cases had a similar origin in the appearance and similar conduct of Cole and Lardner before the Committee and that in each case the employer justified the discharge of the employee under the "good conduct" clause (pp. 847, 848).

This court in the *Lardner* case discussed the significance of the conviction of Lardner for refusal to answer whether he was a member of the Communist Party. It pointed out that in the *Cole* case a provision in the "good conduct" clause that Cole "would conduct himself with due regard for public conventions" necessarily "includes an agreement to refrain from a misdemeanor of this character" and stated that the provision in the Lardner contract that Lardner "shall not conduct himself 'in a manner that shall offend against public decency, morality, etc.'" is an equivalent provision (p. 850).

In the case at bar the "good conduct clause requires plaintiff to (1) "conduct himself with due regard to the public conventions and morals etc." and provides further, among other things, (2) that plaintiff "will not do anything which will tend to . . . bring him into public disrepute . . . or tend to . . . offend . . . public morals or decency . . ." Provision (1) is

stronger than the corresponding provision in the *Cole* case. Provision (2) is as strong as or stronger than the corresponding provision in the *Lardner* case.

Since the evidence as to plaintiff's conduct is substantially identical with the evidence as to Lardner's conduct and since this court declared in the *Lardner* case that Lardner's conduct was such that his employer was justified in discharging him for violating this "good conduct" clause, we respectfully submit that the trial court correctly found in the case at bar that this defendant was justified in discharging plaintiff herein for violating plaintiff's "good conduct" clause (Finding XI, R. 54, 55).[24]

There were findings in this case that the Committee held closed and public hearings regarding Communist infiltration of the motion picture industry, that a public hearing was held in Washington, D. C. on October 20 to 30, 1947, that all matters pertaining to such hearings received the widest possible publicity and aroused and sustained public interest, concern and discussion throughout the United States and elsewhere (Finding VI, R. 52, 53); that the expressed attitude of such industry that there was no such infiltration but that the industry would cooperate fully in the investigation was widely publicized (Finding VII, R. 52); that nineteen of the persons subpoenaed for the Washington hearing, including plaintiff, agreed as to the manner in which they would conduct themselves before the Committee, that eleven of such nineteen were called as witnesses and ten thereof, including plaintiff, refused to answer questions of the Committee as to whether they were or had been members of the

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[24]Finding XI and only Finding XI is prefixed by the statement "In pursuance to the case of *20th Century Fox v. Lardner*, 216 F. 2d 844, the court finds that:".

Communist Party (Finding VIII, R. 53); that as a result of such refusals on November 24, 1947, the House of Representatives referred the report of the Committee in regard thereto to the United States Attorney for the District of Columbia to the end that plaintiff and the others who had refused to answer might be prosecuted, that the report of the Committee and the resolution of the House were widely publicized throughout the United States and elsewhere (Finding IX, R. 53, 54); that the plaintiff and such other persons were duly indicted and convicted of the crime defined in Section 192 of Title 2 of the United States Code and that such conviction was based upon their refusals to answer pertinent questions asked by the Committee, including the question as to Communist membership (Finding X, R. 54); that the discharge of plaintiff by defendant was in good faith and for good cause (Finding XII, R. 55); and that plaintiff has not been damaged in any amount by any act or omissions of defendant (Finding XIV, R. 56).

Each of the Findings to which reference has been made was supported by evidence substantially identical with that which was before this court in the *Lardner* case and in the *Lardner* case that evidence was interpreted by this court in such manner as to justify these findings.[25]

The Conclusions of Law Are Proper.

The Conclusions of Law are to the effect that plaintiff was discharged justifiably, that the right to discharge was not waived, that the conduct which gave rise to such right

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[25]Plaintiff contends that the statement prefixed to Finding XI to the effect that it is made pursuant to the *Lardner* case limits the effect of the facts there found. Without conceding plaintiff's contention we earnestly assert that, even if Finding XI were omitted, the Conclusions of Law would be warranted.

was not condoned and that defendant is entitled to judgment.

Upon examining the findings, either including or excluding Finding XI, we discover the same ultimate facts that caused this court to decide in the *Lardner* case that the employer was justified in discharging the employee.

If what has been said by us regarding the Findings and Conclusions is sound, the judgment of the trial court should be sustained.

While we have thought it necessary to refer to the evidence in this case at some length (mainly because of plaintiff's highly selective presentation) we shall not, having established that it is substantially the same as in the *Lardner* case, belabor this court with legal arguments which have already been made by this court in the *Lardner* and *Cole* cases.

It remains to discuss the arguments presented by plaintiff even though we respectfully submit that what has been heretofore said demonstrates defendant's right to the judgment entered in the trial court.

The Order of the Trial Court Granting a New Trial Was a Proper Exercise of Discretion.

As we read plaintiff's brief it is his contention that, since there was no conflict in the evidence concerning what Scott did or concerning the surrounding circumstances and because the jury determined that what he did was not a breach of his contract, the trial judge abused his discretion in granting a new trial on the ground that the jury's verdict was against the great weight of the evidence. This contention is a far cry from the contention of plaintiff in the trial court in the first trial, as

may be seen from the arguments made by plaintiff to the jury (L. R. 996-1015, 1062-1087) and, also, a far cry from the manner in which this same evidence was interpreted in the brief of Lardner in the appeal to this court. When the trial court determined that the verdict was against the weight of the evidence the trial court properly considered the evidence upon many disputed points. Most, if not all, of the evidence is now before this court for the third time and we spare the court a detailed discussion of the contentions of plaintiff and his fellows which by this time the court knows as well as do the parties to this appeal.[26]

But the court also granted the new trial on the ground that "to permit the verdict to stand would be a miscarriage of Justice" (R. 46). In its motion for a New Trial defendant relied upon various errors of law (R. 40) in the admission and exclusion of evidence and in the instructions to the jury. Certain of these contentions of defendant were determined to be sound and substantial in the *Lardner* case. Since plaintiff directs his argument solely to the alleged impropriety of granting the new trial on the ground that the verdict is contrary to the weight of the evidence we feel that we should not burden this court further than by pointing out that the order for a new trial was justified upon this other ground, as well as upon the ground which plaintiff attacks.

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[26]We do not of course, concede plaintiff's proposition that the trial court could not set aside the verdict because it was contrary to the weight of the evidence and we direct attention to *The Connemara,* 108 U. S. 352, 360; *Charles v. Norfolk & Western Ry. Co.,* 188 F. 2d 691, 695; *Rodegir v. Phillips,* 85 F. 2d 995, 996; *Woodward v. Atlantic Coast Line R.R.,* 57 F. 2d 1018.

It Is Not the Differences but the Similarities in the Scott and Lardner Contracts That Are Controlling.

We have heretofore presented the similarities in the Scott and Lardner "good conduct" clauses and have demonstrated, we trust, that since the evidence in the *Scott* and *Lardner* cases is substantially the same, the determination by this court in the *Lardner* case that the evidence showed a breach of the "good conduct" clause, even if it is not controlling as a matter of law, is equally applicable in the *Scott* case.

Scott's Conduct Was a Violation of the "Morals" or "Good Conduct" Clause of His Contract.

Without abandoning any arguments heretofore made we deal here solely with plaintiff's argument that late decisions of Supreme Court of the United States make it clear that Scott's conduct was not a violation of his contract. This argument assumes that the sole reason for holding that Scott had breached his contract was his conviction for contempt of Congress based upon his refusal to answer the questions of the Committee. Obviously, the assumption is not sound. If there had been no conviction it would still be true, under the authority of the *Lardner* and *Cole* cases, (1) that Scott had not conducted himself with due regard to public conventions and morals (2) that he had done things which tended to bring him into public disrepute and which tended to shock and offend the community and public morals and decency (3) which prejudiced his employer and (4) which lessened his capacity to fully comply with his contract obligations.

Quinn v. United States, 349 U. S. 155, and *Fagenbaugh v. United States,* 232 F. 2d 803, do no more than hold that, *when a witness has invoked the Fifth Amendment* in refusing to answer, the witness is not in contempt unless the Committee makes it clear that it has overruled his claim of privilege and then specifically directs the witness to answer.

In Mr. Scott's testimony before the Committee (L. R. 330-335) he was asked (a) whether he was a member of the Screen Writer's Guild and (b) whether he was or had been a member of the Communist Party. Mr. Scott refused to answer either question and did not invoke the Fifth Amendment.

Plaintiff says (36) that in view of the *Quinn* and *Fagenbaugh* decisions it is clear that "Mr. Scott's conduct would not today be thought to constitute an offense. He was not at any time directed to answer the questions propounded to him."

Scott was specifically directed to answer the question as to membership in the Screen Writers' Guild and to it he interposed no Constitutional objection (L. R. 331-334).

We need not debate the proposition that Mr. Scott's conduct would not today "be thought to constitute an offense" because as the record stands and will continue to stand he was convicted of a specific offense and he must face the consequences of that conviction.

We cannot leave unchallenged, however, plaintiff's assertion that under the decision in *Slochower v. Board of Ed.,* 100 L. Ed. (Adv. p. 449), no implication whatever may be drawn from the failure of a witness to answer a Congressional inquiry.

In the *Slochower* case there appears the statement quoted in plaintiff's brief (pp. 36, 37) to the effect that the court condemns "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", that it is an improper assumption that those who claim this privilege are either criminals or perjurers, and that the privilege "would be reduced to a hollow mockery if its exercise could be taken as equivalent to a confession of guilt or a conclusive presumption of perjury". This is strong language even though it is dictum in a case which was decided on the ground that the discharge of Slochower was wrong because it violated the due process requirements guaranteed by the Fourteenth Amendment. However, even the dictum is related to a situation in which the Fifth Amendment is invoked and there was no such invocation in the case at bar.

Even if the quoted statement was not dictum and even if Scott had invoked the Fifth Amendment, it could hardly be claimed to overcome the California authorities to the following effect:

When evidence is suppressed or withheld by a party in control of such evidence, the natural inference arises that the evidence would be unfavorable to such party. It is not necessary to ignore such inferences in order to preserve the party's constitutional privilege against self incrimination. The privilege is to protect the party from compulsory disclosure of facts associating the party with a crime. It would be an unjustifiable extension of the privilege to hold that not only could the party not be compelled to make such a disclosure but, in addition, that no inference might be drawn from the refusal to answer. It is not the purpose of the privilege to enable the claim-

ant of the privilege to prevail in non-criminal proceedings in which the guilt or innocence is not involved in so far as criminal liability is concerned. All inferences except that of guilt are permissible.

See:

Fross v. Wotton, 3 Cal. 2d 384;
Spath v. Seager, 39 Cal. App. 2d 10;
In re Berman, 105 Cal. App. 37;
Stillman, etc. v. Watson, 115 Cal. App. 2d 440;
People v. Richardson, 34 Cal. App. 2d 528.

The Findings of Fact Warrant the Conclusions of Law Despite the Prefix to Finding XI.

As we have sought to demonstrate under our heading "The 'Good Conduct' Clause In This Case Is The Equivalent Of The Corresponding Clause In The Lardner Case And, Since The Evidence Concerning Scott's Conduct Is Identical With That Concerning Lardner's Conduct, The Discharge Of Scott Was Equally Justifiable" the findings are sufficient to warrant the Conclusions of Law even if Finding XI be excluded. However, we by no means concede that it must be excluded by reason of the prefix. The prefix is surplusage which may be disregarded in view of the declaration of the trial court which precedes *all* the Findings: "The Court having duly considered the matter, makes its findings of fact and conclusions of law as follows" (R. 49, 50). Even if we disregard the effect of this—as we believe—controlling declaration, the court's statement amounts to no more than our oft-repeated assertion in this brief that since the evidence in the case at bar relative to the matters covered in Finding XI is substantially identical with the evidence in the *Lardner*

case relative to the same matters, the findings conform to this court's interpretation of the similar evidence in the *Lardner* case.

Finally, if as plaintiff contends, Finding XI is a Conclusion of Law, then upon the authority of the *Lardner* case it is warranted by the findings of fact and is no less effective because it appears amongst such findings.

Conclusion.

We respectfully submit that for the reasons and upon the grounds set forth and upon the authority of the *Lardner* and *Cole* cases the judgment herein should be affirmed.

Respectfully submitted,

Irving M. Walker,
Herman F. Selvin,
Mitchell, Silberberg & Knupp,
Attorneys for Appellee.

APPENDIX.

Specimens of Editorials Contained in Defendant's Exhibits "F" and "K."

Texarkana, Ark., Gazette, Nov. 24, 1947:

Traitors in the Films.

Every member of the Communist party is an enemy of America. There is no doubt about that. And Comunists in America are seeking to bring about the downfall of this country, just as they are seeking to bring about the downfall of a large number of countries in Europe.

The most recent and dangerous Communistic activity in this country was brought to light in the Thomas committee's probe of Un-American activities in the moving picture industry. The films form the most popular medium of amusement in America. Men, women and impressionable children see them. No greater appeal to human emotions and sensibilities can be imagined.

Filmland delighted the Communists as a soil admirably adapted to the spread of their doctrine. They have been at work for some time. Paul V. McNutt, an eminent attorney and political leader, has been retained apparently to assist Eric Johnston to cover Communistic propaganda in the films. Wendell Willkie apparently was employed for the same purpose some years ago.

A great publicity campaign is being carried on by actors, actresses, screen writers, directors, Johnston and McNutt to delude the American people and to threaten the members of the Thomas committee and others, who are asking only a simple question: Are you a Communist? Evidently these people prefer a citation for contempt rather than to tell their true names and to answer whether or

not they are Communist, points out George E. Sokolsky in his syndicated column.

An honest man does not hesitate to make public his correct name, address, religious, political and fraternal affiliations, and to do so under oath. The only ones who dare not take such an oath are those who fear the charge of perjury and its consequences. Therefore, it seems clear to us that those Hollywood people who howl freedom of thought and speech, but who refuse to answer honest questions before a committee representing the people of their country, are not honest American citizens and the implication is apparent that they are Communists or "fellow travelers."

The American people will welcome whatever facts can be brought to the surface, so that they may be safeguarded against the forces that wrecked and ruined country after country in Europe. If the Thomas committee proves that the movies have not been used corruptly, then that is to the credit of the motion picture industry. If it is proved otherwise, then the people should know and should know who are the offending actors, directors, script writers and others in the film industry were or are. We do not have to declare war to catch traitors.

Bridgeport, Conn., Telegram, Oct. 30, 1947:

COMRADES IN HOLLYWOOD.

In this free country it is most difficult to understand why anyone in his right mind would want to be a communist. Communism thrives on spreading suffering and misery until free people, either through desperation or by force, accept the "fuller and richer life" promised by those who have never even tasted of a full or a rich life.

It is beyond our understanding why anyone should prefer hunger, cold, labor slavery, poverty, sickness and slow death—which is what the people get from their communist rulers—in preference to the full life and happiness of free America.

But, in this country, if a person wishes to be a communist, a believer in the morbid existence that communism offers, he may be one. He can speak or write about communism, can address public meetings or use the government mail service to spread his subversive doctrines. Native communists and imported ones like Eisler can hire halls and receive police protection during meetings even though they are obviously against the public interest.

In Washington the House Committee on un-American Activities is probing the extent of communist infiltration in Hollywood. It is merely trying to show the American people how far these comrades have wormed their way into the motion picture industry. The committee is doing nothing to infringe upon producers,' writers' or actors' civil liberties, nor is it making anyone's personal beliefs a test of employment. The committee is making no attempt to abridge any of the "rights" of communists in this free land.

Despite all the noisy criticism of commies and their friends that the rights of a free press and speech and radio are imperiled, that the Bill of Rights is being trampled upon, etc., etc., the Committee has clearly shown that there are scores of people in the so-called movie capital who seek to foist the "fuller and richer life" upon Americans by plugging the party line in films, and in a manner which they could not possibly do openly.

The finger is on them, and they know it. They have sneaked into jobs, key spots in the industry, and for all we know, may be taking orders direct from a foreign power. It is obvious from the start that they seek through the screen to influence the beliefs and the morals of the American people. Although they may not have been too successful, the public's interest and right to know what they are doing, is not lessened.

The Hollywood people have made a ridiculous defense and the screaming of those who refused to admit their affiliation with the communist party, has caused great damage to the motion picture industry in this country. Even though reams of publicity are being created in Washington, which is supposed to be the lifeblood of the industry, it is not good publicity. It is the sort that undermines the faith of the people in a legitimate American activity.

Since it is no crime to be a communist, we can find at least a modicum of respect for one who is willing to stand up and be counted, but none, not even a grain of respect for those who hide themselves under the cloak of respectability, yet carry on in secret the sabotage of decent Americanism.

Rockville, Conn., Rockville Leader, November 13, 1947

THE HOLLYWOOD INVESTIGATION.

The investigation into Communist activities in Hollywood was on the whole hardly an edifying spectacle. Several facts have emerged however, which cannot be disputed: there are Communists connected with the motion picture industry; these Communists have attempted to inject the party line into pictures; to date these attempts have been thwarted by the industry itself.

Certainly it is difficult to imagine any place where Communist propaganda could do more harm than in motion pictures which are seen by millions of people of all ages. Educators are agreed on the value of visual aids in teaching, and the Communist party line, injected into films, would have an insidious effect. The fact that such propaganda has been kept out of pictures speaks well for the ability of the industry to police itself.

Whatever may be one's opinion as to the tactics employed by members of the investigating committee, and much could be said on this matter, anyone who believes in the American form of government cannot fail to be disgusted with those screen writers who refused to give a straightforward "yes" or "no" to the question as to whether or not they are or have been members of the Communist party. Any real American should be glad to answer with an emphatic "no." Refusal to do so has laid these individuals open to the suspicion that they actually are Communists. Had they answered "yes" one could have respected their willingness to stand up for their convictions while abhorring their beliefs.

The most sensible statement was made by Eric Johnston, spokesman for the motion picture industry. Mr. Johnston said that he would welcome an investigation of Communism in the movies provided it followed court procedure where the accused had an opportunity to defend themselves against any irresponsible charges. He also expressed himself as being strongly opposed to government censorship. Until the industry shows that it is powerless to censor itself, most people will agree with Mr. Johnston. Political censorship can lead to as great evils as those which it censors.

Frankly, it seems a little ridiculous to hound Communists and still allow the Communist party to exist. J. Edgar Hoover, head of the FBI, has opposed outlawing the party on the grounds that such action would only drive the Communists underground where it would be more difficult to keep track of them. Mr. Hoover unquestionably knows more about the problem than most people, but it is a question that deserves serious consideration. It seems increasingly to be less a legitimate political party than a group which desires to overthrow the government by force and takes it orders from a power outside the United States. As such, it hardly seems to deserve a place on the ballot.

Columbus, Georgia, The Columbus Ledger:

WHAT IS THIS "FREEDOM"?

Those Hollywood people who seek to wrap themselves in the American Flag in order to hide their Communist affiliations have a little of the appearance of trapped rats as they snarl and heckle the Congressional committee which is seeking to disclose "red" infiltrations.

Ordinarily, we believe we are as devoted to "civil liberty" as anybody. Ordinarily, we would agree with the contention that a man's political conscience is his own affair.

> *But there are some men and women who do not—and in the nature of their vocations cannot—lead "private" lives. Public office holders cannot claim total privacy of thought and action. Neither can those who write books or, for that matter, those who edit magazines or newspapers. And neither can those who make the nation's motion pictures.*

Such men and women sacrifice a good deal of their privacy simply because they have elected—and it is wholly

a matter of their own free choice—to follow callings which have such an obvious impact in shaping public opinion that the masses of the people have special prerogatives when it comes to inquiring about their political beliefs.

The people, in a word, *have a right to know* what makes such men and women "tick."

They have a right to ask whether they be Democrats, Republicans, Socialists or Communists—or whether they have any political belief at all. Otherwise they cannot judge with certainty what shapes the opinions and the philosophies which are daily being expounded.

In a very special sense, Hollywood scenarists are not entitled to complete privacy in their political lives, because they wield an extraordinarily potent weapon of propaganda, readily susceptible of *secret perversion.*

And this, indeed, is what is charged against the Hollywood writers! They are not alleged to have operated a Communist propaganda openly—as is done, for example, by *The Daily Worker,* the officially recognized organ of the Communist party in the USA.

> *They are charged, rather, with having operated the Communist propaganda surreptitiously—with "Feeding" the Moscow "line" into films supposedly designed for entertainment only. And it is supremely important for the American people to know if this charge is true or false.*

We have, therefore, little patience for, and no sympathy with, those men and women who prepare the nation's movie scripts, but who won't say—when haled before the bar of public opinion—just where their political loyalties really lie.

If they are not Communists, they should not hesitate to say so, and they should not resent being asked.

If they are Communists, not only the public but the producers of motion pictures have a right to know it.

In all such matters, fair-minded people ought to ask themselves: "What is freedom, really?"

If we may give our own answer to that question, we would have to say that freedom *is not* the right to wrap oneself in the American Flag whilst serving, surreptitiously, the policies and idealogies of a foreign power.

It is not the right to pollute the nation's intellectual stream—its books, its periodicals and its motion pictures—with any dangerous "ism" injected by subterfuge.

And it is not the right to refuse to answer honest questions honestly.

> *As regards Communism, it is no longer possible to view it as simply another political party, operating sincerely within the free American political system. It must now be viewed, rather, as a formidable international conspiracy, managed from abroad and with the avowed objective of destroying the American idea.*

Thus any legally-constituted Committee of Congress has a right and duty to inquire of any man in public life (and Hollywood scenarists *are in* public life) whether they be Communists. Such inquiries have, unhappily, become necessary in order to protect the national security, and if they represent the beginnings of American "concentration camps"—so be it.

Maybe, indeed, that is where we ought to put all the Communists, and let them stay there until they rot.

Decatur, Ill., Review, Nov. 22, 1947:

HURT FILM INDUSTRY.

Hollywood is alive to the fact that the ten men connected with the motion picture industry who refused to answer questions before the House un-American activities committee have cast a shadow over the industry. Eric Johnston, president of the Motion Picture Association of America, says they did "a tremendous disservice."

Citation of the ten men for contempt has been approved by the full committee of the House and the House probably will pass on the charge next week. The men refused to answer on constitutional grounds which may be their right, but in refusing to answer the general public did not follow the technical point made, which must be determined by a court, but read only that the men refused to say where they stood.

In this country a man is considered innocent until he is proven guilty but when he refuses to answer questions the public jumps to the conclusion that he has something to hide. Refusal to talk added to the fire of suspicion that perhaps there is something wrong in Hollywood.

The film industry denies the charges hurled at it by the House Committee but the refusal of the ten men to talk has not helped the industry defense and it is not likely that the industry will come to the defense of the ten men who Mr. Johnston says "have done a tremendous disservice to the industry which has given them so much in material rewards and an opportunity to exercise their talents."

New Orleans, La., States, Nov. 28, 1947:

HOLLYWOOD DECISION.

To sever a worker from his bread and butter under circumstances that might make it difficult for him to make another suitable connection is not a matter to be passed off lightly. Hollywood movie executives must have sensed this when they held a two-day closed meeting to decide the fate of 10 figures cited for contempt of Congress. It was not easy, obviously, to reach a decision.

But the film writers implicated brought their predicament upon themselves. They insisted on keeping secret the matter of their membership or party-line affiliation with the Communist party. Mere membership in the Communist party is less repulsive to the American public, we are inclined to believe, than the snakiness of Commy methods and activities. Our people want all political activities conducted open and above board. This is the traditional American way. Any other system, is Ku Kluxism and when that erupted a few years ago, public sentiment and public action put a foot down promptly and impressively.

It is snaky and contemptible and base to be secretly a member of the Communist party, then pretend not to be or to be something else. It is plain political treachery. It is thumbing the nose at Ameriacn ideals and traditions. Let the Commies do as other political groups do—openly and honestly proclaim their affiliations, alliances, doctrines, objectives and loyalties. Then public opinion could deal with them—in the American way.

Lewiston, Me., Sun., Oct. 28, 1947:

No Cause for Evasion.

The House Un-American Activities Committee probe of Hollywood for possible subversive activity gains more and more attention as it goes along. After several days testimony last week by "friendly" witnesses—those willing to make allegations of Communist activity in the movie colony—the committee ran into opposition yesterday.

In a turbulent forenoon session, a screen writer, John Howard Lawson, was put on the stand. Evidence was given to the effect that he had held a Communist party card several years ago. Then he was asked the plain question whether he is, or ever was, a Communist. He refused to answer, and the committee voted to cite him for contempt of Congress.

Lawson claimed that the committee had no right to question anyone as to their political beliefs. But the courts have frequently held that these congressional committees have very wide powers, as some of the nation's big financiers found out 11 or 12 years ago when Wall Street was the target. What we have cautioned against more than once is the misuse of congressional investigatory powers, and the committee will earn more confidence from American citizens, if it discards all hearsay evidence and sticks to proven facts.

* * *

Getting back to Lawson's refusal to answer, we think he should have replied to the committee's question. If he is not a Communist, and never was one, there is no reason why he could not have answered in the negative. If he is a Communist, or has belonged to the party, that is admittedly an unpopular admission to make at this time.

But we have quite a few people in this country who are enough different from their fellows as to be conspicuous in their beliefs or their way of life. Some think nudism is all right, and they are frequently made fun of as a result. Some hold to odd religious beliefs, others are vegetarians and firmly refused to eat meat. The price they all pay for non-conformity is a degree of public notoriety, and those who are sincere must put up with it.

Perhaps we can put Communists in this class, and leaving aside the question of whether or not they are working for violent overthrow of the government, their membership in the party inevitably singles them out. There is no law against being a Communist here, any more than there is against being a vegetarian or a sun-worshipper. But the very fact of refusing to admit or deny it, before a congressional committee, multiples public suspicion. They should answer yes or no, and if in the affirmative, follow up by asking the Congressmen what they are going to do about it. Because there just isn't anything Congress can do.

Haverhill, Mass., The Haverhill Gazette, Oct. 30, 1947:

BEYOND COMPREHENSION.

Why an American should refuse to put his political affiliation officially on record is something quite beyond our comprehension.

Such refusal, however, has become common since agencies of government began to search out Communist influence in American life.

Some trade union leaders have chosen to be insulted by the idea anybody should ask whether they are Communists.

Now we have Hollywood personalities refusing to answer a congressional committee's questions as to their political affiliations.

Communism is an aggressive force obviously striving o destroy every American institution and to level every American standard.

This is a proposition that needs no more demonstration han the proposition that a thief in the house is a bad man o have around.

Obviously, therefore, the government that tries to root Communism out of the life of the country is acting with he wisdom of the householder who calls the police when ie suspects the presence of a thief.

When an agency of government turned toward Hollywood in its search for Communism, it acted wisely.

Motion pictures are perhaps the most powerful propaganda force in the world. If no Communist agents had got into the movie industry, it would be a strange situation indeed.

The congressional committee had impressive evidence from important figures in the industry, that Communists are doing their evil work in Hollywood. The committee logically followed this evdence with subpoenas to some of the suspected persons.

One suspected person after another refused to answer the committee's question on the ground that asking their political affiliation was an improper invasion of their privacy.

This is a flimsy refuge from an accusing force.

In the minds of the people, we think, these screen persons, by their refusal to co-operate with the committee, perhaps unjustly, have condemned themselves.

Detroit, Mich. Detroit Free-Press, Oct. 28, 1947:

Most Un-American of All
The Committee.

The most un-American activity in the United States today is the conduct of the Congressional Committee on Un-American Activities.

It is so viciously flagrant a violation of every element of common decency usually associated with human liberty that it is foul mockery on all that Jefferson and Lincoln made articulate in their dreams of a cleaner and finer order on earth.

The hyprocritically named "committee on Un-American Activities" should be abolished at the earliest possible moment by the United States Congress and so deeply buried that no other group of publicity-mad zealots could ever again be allowed to tarnish with their stench the greatest institution of our democracy, our halls of legislation.

This Committee is possessed by a denial of human freedom generally associated with the Directorate in the French Reign of Terror, with the Soviet mass slaughter trials, and the Hitlerian blood purges.

No wonder that Stalin, Molotov, Vishinsky and others of that breed [sentence missing] good names for the sheer sadistic glee of getting headlines should be allowed to exist.

*

This newspaper has no defense to make of many of the rotten conditions that exist in Hollywood. But we do applaud the courage of the motion picture actors and actresses and the others who work in the films for fighting

gainst this latest outrage on the part of the fanatical itch hunters.

Paul V. McNutt, their counsel, has demanded that the committee furnish proof of its blanket accusations of communism against the industry.

This is an astounding development for these Congressionally protected slanderers.

"Look," they must say in amazement, "our victims re asking us to produce evidence of our charges! How bsurd! We never prove our accusations. Our job is nerely to smear."

The greatest single weapon within the power of our Government is the power of inquiry so that democracy shall always be cleansed before the eyes of the sovereign people. So vital is it that it should forever be safeguarded as sacred and held inviolate.

But the "Un-American Committee" has prostituted that great function and has dragged down with it to the gutters our great Palladium of human liberty.

Let Congress abolish this smear gang.

Such inquisitions belong to the dark ages of the New Deal.

Grand Rapids, Mich. Grand Rapids Press, Dec. 1, 1947:

RED CLOUD OVER HOLLYWOOD.

The motion picture industry, obviously gravely concerned over the bad publicity it has been receiving lately as the result of the congressional inquiry on Communism, has fired the 10 employes cited for contempt by the Thomas committee and barred Communists from its pay rolls.

While some may contend that the industry was unduly hasty in dismissing the accused before anything actually had been proved against them, it isn't easy to defend the 10 men, since they did little or nothing to defend themselves against the committee's charges and allegations. And even those persons who have been most critical of the committee's methods, or who have insisted that even a congressional committee has no right to pry into a man's political affairs, will find it difficult to blame the picture people for being jittery. They are in the business of selling a mass-communication product and, if they hope to stay in business, they must be unusually sensitive to the currents of public opinion.

There can be no doubt that the American people are concerned over possible Communist activities in their country and are likely to be suspicious of any industry charged with harboring Reds in influential positions. The case against the accused is not based on any claim that they succeeded in getting Communistic propaganda into their finished product—for they obviously didn't succeed in doing that—but is based on the belief that the nation can't be too careful in protecting itself against such a possibility.

The whole incident is particularly unfortunate because some of the men cited worked on some of the finest films of the last few years. But as a group they haven't done much to encourage sympathy for their cause. On the stand they put on a show with a script which sounded as if it had been written by Red propagandists, and in denouncing their dismissal they handed out some more of the same with the charge that their firing was only part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-

emitic, anti-Negro and war-inciting doctrine." Do they expect the American people to believe that ridiculous charge or to accept it as proof of their loyalty to democratic principles?

Nesho Mo., Democrat, Nov. 26, 1947:

FUEL FOR HYSTERIA.

President Eric Johnston of the Motion Picture Association of America indicted 10 film writers and directors who refused to answer questions of the House Committee on Un-American Activities. He declared these men did "tremendous disservice" to the industry. He thinks they should have stood up and been counted "for whatever they are." Mr. Johnston is perfectly right.

An array of circumstantial evidence was lodged against each of the 10. Refusal to answer the committee's question, "Are you a Communist?" left a smudge against the industry. Perhaps some were imbued with the esoteric conviction no one has the right to delve into Communist activity in the United States. The public conviction certainly is that these men balked at the query because they had something to conceal.

It is encouraging to find Mr. Johnston lashing out at such conduct and declaring again that Hollywood has no place for subversives. Perhaps, as he asserts, they fed the fires of hysteria and added to confusion. But the confusion is probably within the industry which doesn't know just what to do with them.

If these 10, or any of them, are Communists they had little alternative. They were forced to button up their testimony, face charges of perjury or by admitting Communist affiliation divorce themselves from cushy film jobs.

St. Louis, Mo., Post Dispatch, Oct. 30, 1947:

THEY WOULDN'T SAY "YES" OR "NO."

Apparently, J. Parnell Thomas is having some success in identifying Hollywood figures as Communists. Ten writers, producers and directors have been cited for contempt for refusing to give a "yes" or "no" answer to the question: "Are you a Communist?" Acting obviously under advice of counsel, the 10 men declined to answer on the ground that it is an improper question, or that they are protected by the Constitution from inquiry into their political beliefs.

It strikes us that the question is quite proper, and we know of nothing in the Constitution that is apropos. Surely, the witnesses cannot refer to that clause of the Constitution which protects a person from self-incrimination. If that clause, indeed, as the one they are invoking, it is an admission by the witnesses that they regard membership in the Communist party as a violation of penal law. That would be playing right into the hands of the committee, which is seeking, in fact, to outlaw the Communist party.

While the performance of the House Un-American Activities has fallen far short of ordinary standards of congressional dignity and has smacked of cheap melodrama, the behavior of the eight men cited for contempt is equally bad. If they are Communists—and the committee has introduced evidence to that effect—their refusal to admit it leaves a very bad taste in the mouth.

Usually men who belong to belligerent minorities or who espouse unpopular causes are happy and proud to make open avowals. These men are not in that mold.

nstead, they hide themselves behind the Constitution f the United States, the very document that Communism ould destroy if it had a chance. It is a strange and epressing spectacle.

Newark Star-Ledger, Nov. 27, 1947:

HOLLYWOOD GETS WISE.

The executives of the movie industry, meeting in New ork, have decided to suspend immediately and without alary the 10 Hollywood personalities who have been ited for contempt of court by the House Committee on Jn-American Activities. The film executives have also ecided to discharge all Communists and to refuse to em- loy Communists, while at the same time taking care to guard against hasty and mistaken judgments of suspected ersons.

This action by the film executives is to be applauded, lthough it is rather belated. More impressive would ave been action by the industry immediately, when these 0 Hollywood personalities refused to state whether or ot they were Communists.

The Communists and their misguided apologists have succeeded in distorting the issue, contending that the civil rights of the accused persons are at stake. This is a clever bit of obfuscation, since it is the civil rights of all the people that are at stake in the continuing conspiracy of the Communists to destroy our way of life.

The basic issue in the struggle over communism is civil rights. It is decidedly untrue that the basic issue is one of economic or social reform. The Communists contend, in practice as well as in theory, that they cannot carry out their program without establishing a dictatorial gov-

ernment and suppressing the freedoms of those to communism.

Those who believe in civil rights thus have the duty of eliminating Communists from positions where they weaken our democratic processes and poison our intellectual food at its source. Their right to expel Communists from positions of influence should be qualified only by painstaking regard for justice in considering borderline and disputed instances.

The 10 Hollywood personalities involved in the contempt citations do not admit they are Communists, and some of them may not be. That is not quite the issue. Their refusal to assert under oath that they are not Communists makes them undeserving of positions of influence and power, and dangerous to the cause of civil rights.

The film industry has at last been aroused to its responsibility in protecting itself and the country against the Communist enemies of civil rights. The principle it has at last recognized—that enemies of civil rights should not be sheltered or tolerated in position of trust and influence—should be extended throughout the fabric of industry, business, politics and government.

Patterson, N. J., News, Dec. 3, 1947:

An Unwise and Disastrous Weakening of the Democratic Process.

Every loyal American will emphatically agree with Eric Johnston of the Motion Picture Association that the ten movie industry employes who refused to tell the House Un-American Activities Committee whether or not they were Communists have "done a tremendous disservice to the industry" and "hurt" the cause of democracy immeasurably.

Even those who were appalled by the committee's conduct of some phases of its recent hearings can find scant justification for the attitude of witnesses who contemptuously refused either to admit or deny membership in the Communist Party. The Bill of Rights guarantees every American broad freedom to think and speak as he pleases, but it guarantees him no right to wear false colors or to cloak his propagandist efforts in secrecy.

The issue raised by the Hollywood investigation in this respect could not be more cogently or thoughtfully presented than in the recent report of the President's Committee on Civil Rights. No one would question the sincerity of this committee's regard for civil liberties, yet it urges, for the express purpose of "strengthening the right to fredom of conscience," that legislation be enacted to require "all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves through systematic registration procedures."

"One of the things which totalitarians of both left and right have in common," the committee observes, "is a reluctance to come before the people honestly and say who they are, what they work for and who supports them. . . . We do not believe in a definition of civil rights which includes freedom to avoid all responsibility for one's opinions. This would be an unwise and disastrous weakening of the democratic process. If these people wish to influence the public . . . they should be free to do so. But the public must be able to evaluate these views."

In urging the registration of all opinion-swaying groups, the Civil Rights Committee makes it plain that "our purpose is not to constrict anyone's freedom to speak; it is

rather to enable the people better to judge the true motives of those who try to sway them." The "principle of disclosure," in short, is "the appropriate way to deal with those who would subvert our democracy." And that—all ballyhoo and indiscretions aside—is precisely the principle which the House Un-American Activities Committee was created to serve, and did in fact serve with its Hollywood hearings.

Buffalo, N. Y., News, Oct. 31, 1947:

HOLLYWOOD DEFIANT.

In its investigation of Communism, the House Un-American Activities Committee laid itself open to criticism for entering hearsay testimony in the public record. This procedure was condemned as violating the spirit of the Bill of Rights.

But the committee cannot be criticized for putting to Hollywood writers and others appearing before it the question whether or not they are or have been Communists. This is a legitimate question; it is entirely consistent with the purpose for which the committee was created—to determine the extent and character of un-American activities and the spread of anti-American propaganda within the United States.

Certain of the Hollywood screen writers insolently refused to answer the question; and they very properly were held in contempt by the committee. In announcing the conclusion of the "first phase" of the investigation, Chairman J. Parnell Thomas did not indicate whether the committee was closing the book on Hollywood. The strange part of it was that Eric Johnston, president of the Motion Picture Association of America, should have

given countenance to the recalcitrant screen writers by charging that the committee was using unfair methods in relation to them, such as would create "a damaging impression of Hollywood."

This is plain hogwash. It is the defiant and arrogant screen writers who are creating a damaging impression. By their attitude they inferentially lend support to previous testimony that Communists have infiltrated into the industry—whether or not they themselves are Communists. Obviously, those who are Communists have been intent on insinuating Moscow propaganda into the movies. All such are missioners of that faith; this is a condition of party acceptance. All Communists are un-American—enemies of the American way of life.

The Government has a right to know who in the motion picture industry are Communists, just as it has the right to know who among the labor leaders are of that faith. In short, it has the right to protect itself against their designs. They hold themselves subject to the dictates of a foreign power, a power which is waging a "cold war" against the United States. In the circumstances, a thoroughgoing American could hardly feel that he had good reason to refuse an answer to the question: Are you a Communist?

New York Herald Tribune, Oct. 22, 1947:

HOLLYWOOD IN WASHINGTON.

The first two days of testimony upon Communism in Hollywood before the House un-American Activities Committee have produced exactly what was expected of them: an abundance of unsubstantiated charges, some dizzying new definitions of Communism and a satisfactory collec-

tion of clippings for Mr. J. Parnell Thomas's scrapbook. A good many citizens of Hollywood have been called Communists, to the evident delight of Mr. Thomas and his witnesses. One man has already been thrown bodily from the hearing room, and Mr. Bartley Crum escaped the same fate only because he was able to swallow his sense of indignity just before Mr. Thomas struck.

There are, without doubt, circumstances under which such an investigation as this one would be proper. If the moving pictures were undermining the American form of government and menacing it by their content, it might become the duty of Congress to ferret out the responsible persons. But clearly this is not the case—not even the committee's own witnesses are willing to make so fantastic a charge. And since no such danger exists, the beliefs of men and women who write for the screen are, like the beliefs of any ordinary men and women, nobody's business but their own, as the Bill of Rights mentions. Neither Mr. Thomas nor the Congress in which he sits is empowered to dictate what Americans shall think.

Some attempt was made to show that Communism was being permitted to creep into films, but in each case the attempt dissolved into the ludicrous. Mr. John Moffit, for example, cited as an example of the party line a scene in which a banker is portrayed as an unsympathetic man—a typical Hollywood stereotype that has been written into moving pictures since long before any Communist menace was noticed on the west coast. Mr. Moffit also firmly assured the committee that forty-four of a hundred Broadway plays constituted Communist propaganda, without mentioning how the fact has so far escaped the notice of Broadway.

No doubt the revue is still only in its preliminary scenes, and Mr. Thomas has a good many more acts to trot out before he rings down the curtain. To date he has brought forth nothing to make the whole affair seem anything more than an attempt to seek personal aggrandizement on the taxpayer's funds. Not Hollywood but Congress is being investigated here, and once again the testimony indicates that the system of Congressional investigating committees needs overhauling. The entire process, in which a committee chairman is allowed unlimited freedom and his targets must remain simply targets, is inherently offensive and should be changed to bring some degree of equity into the proceedings.

New York Herald Tribune, Nov. 27, 1947:

COMMUNISM AND HOLLYWOOD.

It is doubtful whether any one, with the exception of Mr. J. Parnell Thomas, will feel happy over the action of the motion-picture industry in firing the ten persons cited for contempt of the Thomas committee and in henceforth barring Communists from the industry's pay rolls. The industry's own unhappiness is evident enough from the tortured language of the announcement, in which respect for justice and civil liberty struggles both painfully and obviously with the desire to escape the embarrassments brought down by Mr. Thomas's hippodrome.

Many will observe that the motion-picture business seems to have got along very well in the past utilizing the services of the evasive ten without discovering Communist propaganda turning up in its products. Many will feel that it is simply a case of a gigantic industry, always notoriously timid and sensitive to any kind of mass reaction, running to cover from popular hysteria, at the ex-

pense of destroying the livelihoods of a few writers and directors against whom nothing has been proved except that they evaded answering as to their political beliefs. It is neither a heroic nor an inspiring attitude. But is it inadmissible?

One cannot blink the fact that this is another of the difficult questions forced upon us by Communism, by its nature, its aims and, in particular, its methods. Communist secrecy and infiltration are facts, and it is difficult to argue that an industry of mass communications is denied by democratic principles the right of protecting itself against them. The ten put on a show before the Un-American Activities Committee which was damaging to the industry. Now they have issued from Hollywood an answering blast, denouncing their dismissal not merely as an invasion of their liberties but as part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-Semitic, anti-Negro and war-inciting doctrines."

Here is a piece of politically inspired propaganda nonsense of a kind which Hollywood certainly cannot be required to protect or encourage. It is hard to maintain that a mass-communication industry is powerless to deny employment on suspicion of secret membership in a subversive organization. This newspaper believes the power must be conceded; but it certainly should be used as sparingly as possible, and one trusts that the motion-picture industry's insistence on fairness and moderation will be observed.

The Raleigh Times, N. C., Nov. 1, 1947:

WHAT HAVE REDS GOT THAT OTHERS HAVEN'T?

The Communist Party advocates forceful overthrow of the United States Government, yet it sometimes seems that officials bend over backward to be nice to Communists.

Pin a Red label on someone, and he often can "get away with murder." He can get away with a lot of things which would land a run-of-the-mine loyal American citizen in serious trouble. For, once a Commie is put on the spot all the good brethren put a halo of martyrdom about his marxist head and shed maudlin tears about his "civil rights" and "liberalism." And it is a Communist tradition to yell bloody murder about the Constitution and the Bill of Rights which the Communist Party seeks to destroy.

A disgusting spectacle has just closed in Washington. There, a dozen or so screen writers have been asked the simple question of whether or not they are, or have been affiliated with the Communist Party. To this question they have shrieked defiance at the House Committee on Un-American Activities, a quasi-judicial body, and hurled insults at its members.

In sum, these people consider themselves above the law. Their attitude not only insults the Un-American Activities Committee, but it insults every law-abiding American citizen as well.

If a plain, garden variety of American were to act as these fellows have acted, he would have landed in the well-

known hoosegow in short order. These recalcitrant witnesses have been cited for contempt. If they are not prosecuted vigorously, then the authorities responsible for their prosecution should hang their heads in shame.

And if the big moguls of the motion picture industry permit them to continue writing for the films their action can be construed as a slap in the face of the law abiding public which supports them.

Ashtabula, O., Star Beacon, Nov. 6, 1947:

THE '$64 QUESTION.'

Several subpoenated witnesses appearing before the House un-American Activities Committee in Washington refused to answer what has been called the "$64 question." This question is "are you now or have you ever been a member of the Communist Party?"

Motion picture writers stood on what they called their constitutional rights and declined to say yes or no. They face court action on charges of contempt as a result of their obstinate refusal to admit or deny they are or have been Communists.

These screen writers, who may have been advised by their attorney not to answer the question, do not make a good impression on public opinion by taking this attitude. For while it is quite possible for one who is not and has not been a Communist to refuse to answer this question, it is suspected that most persons who do not belong to and never have been members of this subversive so-called party would reply to the query without quibbling over constitutional rights.

If someone who disapproved the committee, or its methods, or its personnel, or everything connected with it

and wished to plague and annoy and embarrass it, he might decline to answer although not a Communist.

However, the impression the public will get from the refusal of these men to say whether or not they are or have been Communists is that they may have something to conceal. They make themselves suspect by declining to answer. The committee might call for—if it hasn't done so already—the F. B. I. files made during the war as it checked on Communists in this nation.

Toledo, O., Blade, Nov. 11, 1947:

On Questions and Answers.

When we said sometime ago that we did not like the way the House Committee on Un-American Activities goes about smearing witnesses in its inquisitorial hearings, we did not mean that we liked the way some of those Hollywood chaps raved and ranted when they took the witness stand.

Americans standing on their traditional rights as free men in a democratic country don't have to spout forth gibberish. If they are asked questions about their private affairs or political opinions which no one has a right to ask, they can reply bluntly, "It's none of your business" or, if they prefer, "It's none of your blankety-blank business." If they are even asked questions about crimes which they have committed, they can refuse to answer on the grounds that they cannot be required to give incriminating evidence.

But though a free man in a democratic country is not required to answer the questions of police investigating a crime, it is hard to understand why an innocent man

would refuse to do so. And it is equally difficult to understand why a good citizen would refuse to give pertinent information to any duly constituted government body. Just as a law-abiding citizen will want the law enforced, so will a tax-paying citizen want to see government funds wisely spent and carefully checked.

For these reasons, we are glad that the revival of the Hughes inquiry before the Senate War Investigating subcommittee has taken, so far, a saner turn. The committee shouldn't set out to smear the reputation of any citizen. Any citizen should be glad to supply the committee with any information pertinent to its investigation. Only on that basis can all of us continue to enjoy those democratic rights which impose democratic obligations.

Chattanooga, Tenn. Chattanooga News-Free Press:

Only One Verdict Possible.

If a man on trial in a court of law hears positive evidence given against him and fails to deny his guilt or to present any other defense, the jury has no choice but to conclude that he is guilty.

Of course the Hollywood characters who have been called before the House Un-American Activities Committee in its investigation of Communist infiltration into the movie colony are not on trial for any crimes or misdemeanors. But they have been summoned by a committee of the Congress of the United States, which has full legal powers to summon and to question them, in pursuance of its efforts to find out to what extent the Communists have succeeded in gaining a foothold in the moving picture business for the purpose of using the movies for the dis-

emination of their poisonous attacks on American life nd American institutions.

Critics of the Hollywood Red probe have seized upon he inevitable pieces of trivia that have turned up in the vidence and have emphasized these in their efforts to liscredit the investigation.

The evidence against the Hollywood writers who have refused to tell the committee whether or not they are Communists, however, is not trivial. The committee has heard positive testimony that they are Communists and detailed testimony on how some of them worked to carry out the Communist propaganda scheme in Hollywood. Communist party membership cards identified as those of the accused men have gone into the record.

To date four of the Hollywood figures accused of being Communists have refused to answer this question—John Howard Lawson, who, it has been testified, was the Red "commissor" in Hollywood and instructed Communist writers to get "five minutes of the party line" in every picture; Dalton Trumbo, Albert Maltz and Alvah Bessie.

They have been cited for contempt of the committee and the charges should be pressed with the utmost vigor—against them and against all others who may adopt their tactics. They are not only technically in contempt for their refusal to answer questions; their conduct before the committee has been contemptuous in the extreme.

These men have been denounced as Communists by reliable witnesses. If they persist in their refusal to either confirm or deny the charges, the jury will have no choice in arriving at a verdict. The verdict will have to be one of guilt. The jury in this case is the people of the United States.

Greenville (Texas) Evening Banner, Oct. 30, 1947:

STRANGE DEFIANCE.

An American who is not affiliated with the Communist Party and does not sympathize with its theories in any particular, should not be ashamed to declare publicly that he is not a Communist. Some of the Hollywood big-wags, however, are not saying "yea" nor "nay" to the question: "Are you a Communist?" propounded at the House un-American Activities subcommittee hearing in Washington.

So far ten so-called "prominent" personages of Hollywood have defied the committee and have been cited for contempt. It is probable that more will be cited before the hearing is ended.

It is the contention of the witnesses that the committee has no right to ask questions about political beliefs. Perhaps not, but regardless of the rights of the committee in regard to this particular question, a non-Communist should not hesitate to say that he is not a Communist, especially when he is a witness in a public hearing of national importance. It would be simple to say "no," but if he says nothing he gives both the committee and the public reason to wonder.

Houston, Texas, Post, Oct. 28, 1947:

RED FILM PURGE.

The dismissal by R-K-O studios of a producer and a director, two of the 10 film characters cited for contempt of the House investigating committee, is good as far as it goes. But the movie industry will not have gone far enough to satisfy public opinion until it fires the other eight men who arrogantly refused to tell the committee whether or not they were Communists.

In fact, the publicity of the investigation has alerted the American people to Red-slanted film propaganda, and henceforth more of them will spot the poison despite its sugar-coating in sweet emotional appeal.

Although the investigators of un-American activities did not probe deeply into the extent of left-wing penetration in the business of making movies, it brought the public a few facts about some of the people who write, direct and produce the film plays, and how they work. And if the industry itself now does not purge the pictures of such fouling, there may be a popular uprising next time.

Producer Adrian Scott's public comment on his discharge is typical of the attitude taken by all Reds, from Molotov on down. He calls the committee's contempt citation a "perversion of justice," and brands it as a "temporary triumph of John Rankin of Mississippi." But more than 300 House members voted to uphold the committee's action and less than a score voted against it.

Mr. Scott and his nine colleagues claimed the right to refuse to divulge their political affiliations under the guarantee of free speech. But Congress has taken the position, and the people will endorse it, that if scenario writers, directors and producers have the right to color their films Red, the public has a right to know who is doing the coloring.

Petersburg, Va., Progress-Index, Nov. 26, 1947:

On the Way to an Answer.

By large majorities the House of Representatives voted contempt citations against ten motion picture writers and directors who refused to tell the un-American activities committee whether they were communists. The matter

now is in the hands of the Justice Department which promises prompt prosecution, with grand jury action coming possibly within a week. While the action of the House in support of its committee is a setback for the view that a person cannot be required to answer the question of Communist affiliation, this does not settle the issue, for it remains to be seen what the courts will do with it.

It does not follow that all or any of the ten are Communists, for though they may have been attempting to hide the fact of party membership they could have refused to answer because they felt their civil liberties were involved. If the un-American committee had conducted its affairs in a more acceptable fashion, relying only upon real evidence and allowing accused persons every opportunity to clear themselves, perhaps we would have been spared some of these performances, but the shortcomings of the investigating committee, serious as they are, do not justify refusal to answer yes or no to the question of Communist affiliation. In the prevailing atmosphere those who take that course need not be surprised to find themselves under greater suspicion than ever.

While the issue goes to the courts there are signs the motion picture industry is doing some housecleaning of its own, which is as it should have been all along. Hollywood's red menace can be sized up by saying it is by no means as great as the hysterical ones would have us believe but has real potential seriousness in that Communists with the usual determination and more than the usual supply of funds have occupied some key positions. An industry which has policed itself in other respects ought to be able to take care of this one, but evidently outside pressure was needed to bring it to the point of doing so.